

# **In the Supreme Court of the State of Alaska**

**Jerry McCavit and Brenda McCavit,**  
Appellants,

v.

**Barbara Lacher and Louis Lacher,**  
Appellees.

Trial Court Case No. **3PA-13-00918CI**

Supreme Court No. **S-18261**

## **Order**

Stay Execution of Injunction

Date of Order: **February 17, 2022**

Jerry and Brenda McCavit have noticed an appeal of the superior court’s November 9, 2021 decision concluding that the McCavits’ approximately sixteen-foot by twenty-foot “dock extension” (added to the original dock in 2011) on Wasilla Lake unreasonably interferes with the riparian rights of Barbara and Louis Lacher, the owners of neighboring property, and constitutes a private nuisance. The superior court’s November 9, 2021 order includes a permanent injunction requiring that the McCavits “remove their dock extension” by February 7, 2022.<sup>1</sup> Issues regarding attorney fees and final judgment remain pending before the superior court. Ahead of the superior court’s deadline for removal of the dock extension, the McCavits filed a motion before that court for a stay of the permanent injunction pending appeal. The superior court denied that motion. The McCavits have now filed a Motion to Stay Execution of Injunction before this Court. A temporary stay was granted in order to allow time for a response by the Lachers and a decision of the motion. The Lachers oppose the McCavits’ motion for a stay.

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<sup>1</sup> November 9, 2021 Findings of Fact & Conclusions of Law and Order Granting Injunctive Relief, Superior Court Case No. 3PA-13-00918 CI.

The McCavits’ currently noticed appeal is the second appeal in this matter. The McCavits appealed a prior 2017 decision of the superior court that, among other things, required removal of the dock extension. The McCavits were successful, in that the superior court’s decision was ultimately vacated and the matter was remanded for the superior court to apply the “rule of reasonableness” announced by this Court to the Lachers’ claims of interference with their riparian or littoral rights and to further consider the Lachers’ claims of nuisance.<sup>2</sup> During that initial appeal, the McCavits filed a motion, similar to the instant motion, to stay execution of the superior court’s injunction requiring removal of the dock extension. A single Justice granted that motion for stay, concluding that “[t]he McCavits have shown that the ‘balance of hardships’ weighs in favor of granting the motion to stay,” that the McCavits faced irreparable harm in the sense that their right to appeal would be defeated if they were forced to remove the dock extension prior to appeal, that the harm to the Lachers in the event of a stay was slight when compared with the McCavits’ harm in the absence of a stay, and that the McCavits raised serious and substantial issues on appeal.<sup>3</sup>

Although additional evidence introduced before the superior court on remand, and evolving arguments of the parties, impact the balancing inherent in analyzing the McCavits’ current motion for a stay, the parties’ respective postures now are ultimately quite similar to those they occupied when the McCavits’ first motion for stay was granted in 2018. While the McCavits have not set forth a substantial argument regarding entitlement to a stay under a “probable success on the merits” standard, they

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<sup>2</sup> *McCavit v. Lacher*, 447 P.3d 726, 736 (Alaska 2019).

<sup>3</sup> *See* February 27, 2018 Order Staying Trial Court Order.

have once again demonstrated that the “balance of hardships” weighs in favor of granting their motion for a stay.<sup>4</sup>

When evaluating the harm to each party under the “balance of hardships” test, a court must assume that party will ultimately prevail.<sup>5</sup> The McCavits face irreparable harm in the absence of a stay, in that they will be forced to remove their dock extension, and the Lachers may move forward with planned use of the involved space on Wasilla Lake, in a manner that the Lachers have argued is incompatible with the McCavits’ dock, prior to resolution of the appeal the McCavits have noticed.

The Lachers contend that because they have posted a bond, the McCavits no longer face irreparable harm like that identified during the first appeal. However, the \$6,000 bond posted by the Lachers is not sufficient to secure the McCavits’ interests on this appeal. First, although the Lachers have volunteered the posting of this bond pending appeal, and have indicated that the McCavits may seek to recover some or all of that bond amount if they succeed on appeal, it is not at all clear that the McCavits could recover damages associated with removal and possible replacement of the dock extension within this case if they prevail on appeal. Second, the monetary bond does not secure the McCavits’ ultimate interest in this litigation and on appeal, that they be able

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<sup>4</sup> *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (“A plaintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard.”); *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1973) (establishing that when considering a motion for a stay the court is to engage in the same evaluation as it would in determining whether to grant a preliminary injunction).

<sup>5</sup> *Alsworth*, 323 P.3d at 54.

to maintain their current access to and use of adjacent waters. In the event the superior court's permanent injunction takes effect prior to appeal, the parties' respective abilities to access and use adjacent waters – including their ability to build and maintain structures – will necessarily change. The Lachers' proposed monetary bond does not secure the McCavits' ability to restore the status quo should they prevail on appeal. Absent a stay, the McCavits' driving purpose in pursuing an appeal will have been defeated or removed.

Meanwhile, should the McCavits' request for a stay be granted, the Lachers are once again delayed in realizing a legal remedy. This is not insignificant, particularly given the delay that both parties have already experienced in litigation. But the harm associated with delay pending this appeal is relatively slight when compared with the cureless harm faced by the McCavits. Although bonding may be unnecessary with this finding that the Lachers face relatively slight harm with the granting of a stay,<sup>6</sup> the McCavits have proposed that they maintain a currently posted or secured sum of \$40,690.92 (secured by stipulation in 2018). The McCavits also propose adding another \$5,255.35 to that amount to address potential prevailing party attorney's fees and costs on remand.

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<sup>6</sup> See *State v. Kluti Kaah Native Vill. of Copper Center*, 831 P.2d 1270, 1274 (Alaska 1992) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)) (applying the balance of hardships standard where either the injury resulting from the injunction "can be indemnified by bond" or where the injury is "relatively slight in comparison").

Finally, the McCavits have raised issues on appeal that are “serious and substantial” in that they are not frivolous or obviously without merit.<sup>7</sup>

**IT IS ORDERED:** The McCavits’ Motion to Stay Execution of Injunction is therefore **GRANTED**. The McCavits shall post an additional \$5,255.35 to their bond, and shall do so no later than **February 22, 2022**.

The superior court’s final judgment should be filed with this Court as soon as possible after it has been distributed. If the final judgment has still not been distributed, the McCavits shall file a notice with this Court advising of the status of the superior court case by **March 21, 2022**, and every 30 days thereafter until the final judgment has been distributed.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts



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Ryan Montgomery-Sythe,  
Chief Deputy Clerk

cc: Judge Stohler  
Trial Court Clerk - Palmer

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<sup>7</sup> *Alsworth*, 323 P.3d at 54-55.

*McCavit v. Lacher*  
Supreme Court No. S-18261  
Order of February 17, 2022  
Page 6

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